

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Wagenvoord Advertising Group, Inc.)	File No.: EB-FIELDSCR-12-00000481
)	NAL/Acct. No.: 201232620003
Former Licensee of Radio Station KLRG-AM ¹)	FRN: 0010300747
Sheridan, AR)	Facility ID No.: 14053

MEMORANDUM OPINION AND ORDER

Adopted: October 14, 2014**Released: October 14, 2014**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. This Memorandum Opinion and Order denies an Application for Review² filed by Wagenvoord Advertising Group, Inc. (Wagenvoord), former licensee of Station KLRG-AM, in Sheridan, Arkansas. Wagenvoord requests cancellation of the \$7,000 forfeiture imposed on it by the Enforcement Bureau for failing to have an effective locked fence around its antenna structure. The Commission's fencing rules protect the public by limiting access to areas with a high potential for radio frequency (RF) exposure. We find that Wagenvoord failed to provide compelling evidence that a locked fence was not required for its antenna structure and affirm our conclusion that Wagenvoord violated the Commission's rules. However, we find on our own motion that a reduction of the forfeiture to \$5,600 is warranted based on Wagenvoord's good faith efforts to comply with the Commission's rules taken prior to the inspection of Station KLRG-AM.

II. BACKGROUND

2. On March 1, 2013, the Enforcement Bureau issued a *Forfeiture Order*³ finding that Wagenvoord violated Section 73.49 of the Commission's rules (Rules)⁴ by failing to maintain an effective locked fence around its antenna structure.⁵ Section 73.49 of the Rules states that "[a]ntenna towers having radio frequency potential at the base (series fed, folded unipole, and insulated base antennas) must be enclosed within effective locked fences or other enclosures."⁶ Section 73.49 of the Rules further provides

¹ Station KLRG-AM was assigned from Wagenvoord Advertising Group, Inc. to Joel J. Kinlow on February 28, 2013. See File No. BAL-20121115AGZ.

² Wagenvoord Advertising Group, Inc., Application for Review (Apr. 1, 2013) (on file in EB-FIELDSCR-12-00000481) (*Petition*). Because Wagenvoord's filing raised issues which the Enforcement Bureau has not had an opportunity to review, we treat the Application for Review as a Petition for Reconsideration. See 47 C.F.R. § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass"); see also *Side by Side, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 11132 (Enf. Bur. 2012) (treating Application for Review as a Petition for Reconsideration because it raised issues not brought before the Enforcement Bureau).

³ *Wagenvoord Advertising Group, Inc.*, Forfeiture Order, 28 FCC Rcd 1945 (Enf. Bur. 2013) (*Forfeiture Order*), *aff'g* *Wagenvoord Advertising Group, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 27 FCC Rcd 8126 (Enf. Bur. 2012).

⁴ 47 C.F.R. § 73.49.

⁵ *Forfeiture Order*, 28 FCC Rcd at 1945, para. 1.

⁶ 47 C.F.R. § 73.49.

that “[i]ndividual tower fences need not be installed if the towers are contained within a protective property fence.”⁷

3. It is undisputed that Station KLRG-AM’s antenna structure was not surrounded by an individual locked fence or protective property fence at the time of inspection, but was built on top of a 7-foot concrete pedestal encased in 19 ¾ inches worth of insulation. What is in dispute is whether the concrete pedestal and insulation was sufficient to comply with Section 73.49 of the Rules. The *Forfeiture Order* found that the “base” referenced in Section 73.49 referred to the “base of the metal portion of the antenna structure” and that therefore there was RF potential at the base of Wagenvoord’s antenna structure, “albeit not at ground level.”⁸ Accordingly, the *Forfeiture Order* found the antenna structure was required to be enclosed within an effective locked fence or other enclosure and imposed a \$7,000 forfeiture.⁹ In doing so, the *Forfeiture Order* found Wagenvoord’s arguments that the forfeiture should be cancelled because the structure did not pose a safety hazard unpersuasive.¹⁰ The *Forfeiture Order* also found that there were no natural or other impediments to Wagenvoord constructing an effective fence.¹¹

III. DISCUSSION

4. Wagenvoord presents two questions for review in its *Petition*. It first asks “[w]hether a licensee is required to maintain a fence surrounding an AM tower when the AM tower has no radio frequency at the base of the tower structure, and when the radiating portion of the AM fence is already inaccessible due to other barriers erected by the licensee.”¹² Wagenvoord argues that its AM antenna structure had no RF potential at its “base,” *i.e.* at the pedestal, and that “under a strict reading of the Rule . . . there was no actionable violation of Section 73.49.”¹³

5. We find that Wagenvoord’s initial assumption that its AM antenna structure had no RF at its “base” is incorrect. The *Forfeiture Order* properly held that the “base” refers to the “base of the metal portion of the antenna structure,” not the pedestal.¹⁴ Interpreting Section 73.49 of the Rules as Wagenvoord suggests—that the base is the portion of the AM antenna structure at ground level—would eviscerate the regulation’s effectiveness and pose a public safety risk. Although Wagenvoord built a 7-foot concrete pedestal, a station with an AM antenna structure built on top of a 2-foot concrete pedestal could make the same argument, namely that the “base” of the concrete pedestal does not have RF potential and thus the Section 73.49 fencing requirement does not apply. Such a result would pose an extreme safety hazard, as anyone would be able to touch the radiating portion of the structure and potentially electrocute themselves, and is clearly inconsistent with the intent of Section 73.49 of the Rules. Moreover, the illustrative examples in Section 73.49 of the Rules support our interpretation. Section 73.49 lists “insulated base antennas” as an example of an antenna structure that has RF potential at the base.¹⁵ Insulated base antennas have insulation, which does not have RF potential, below the metal portion of the AM antenna structure, but are still subject to the fencing requirements of Section 73.49 of the Rules. Therefore, we find that the *Forfeiture Order*’s holding that Station Wagenvoord’s AM antenna structure was subject to Section 73.49 of the Rules was not in error.

⁷ *Id.*

⁸ *Forfeiture Order*, 28 FCC Rcd at 1946, para. 4.

⁹ *Id.* at 1947, para. 8.

¹⁰ *Id.* at 1946, para. 4.

¹¹ *Id.* at 1946–47, paras. 5, 8.

¹² *Petition* at 3.

¹³ *Id.* at 4.

¹⁴ *Forfeiture Order*, 28 FCC Rcd at 1946, para. 4.

¹⁵ 47 C.F.R. § 73.49. *See supra* para. 2.

6. Having established that Wagenvoord's AM antenna structure had RF potential at its base, and that Section 73.49 applies to all such structures, we agree with the *Forfeiture Order* that Section 73.49 requires a base fence for the antenna structure unless the structure is surrounded by a protective perimeter fence.¹⁶ Wagenvoord cited a few cases with insufficient fences in which the forfeiture was nevertheless reduced or cancelled, but those cases were properly distinguished in the *Forfeiture Order*.¹⁷ Although Wagenvoord is correct that the cited cases "credited natural barriers or even [natural] conditions that temporarily impede direct access to a tower as mitigating factors,"¹⁸ no such natural conditions were present at Station KLRG-AM. Moreover, Wagenvoord provided no reason why it was unable to construct an effective locked fence around the base of its antenna structure or that natural barriers impeded access to the tower.¹⁹

7. Second, Wagenvoord asks whether a cement pedestal plus insulator, which together are over nine feet in height, together qualify as an "enclosure."²⁰ The Enforcement Bureau has found in only one instance that a 12-foot concrete pedestal qualified as an "other enclosure," but this conclusion was based on the totality of the circumstances, namely that the AM antenna structure was built on a flood plain and the structure owner was prohibited by local zoning restrictions from constructing a fence.²¹ Given that Wagenvoord was not prohibited in any way from erecting a fence around its AM antenna structure, we find no reason to conclude that its pedestal plus insulator qualifies as an "other enclosure." Therefore, upon review of Wagenvoord's *Petition* and the entire record herein, we affirm the conclusion in the *Forfeiture Order* that Wagenvoord willfully and repeatedly violated Section 73.49 of the Rules.

8. However, we do acknowledge that most people would be unable to reach the RF potential on Wagenvoord's antenna structure and the structure does not pose the same safety hazard as an unfenced AM structure not built on a high, insulated pedestal. Moreover, we recognize that Wagenvoord erected its concrete pedestal prior to the inspection. Accordingly, on our own motion, we conclude a \$1,400 reduction in the forfeiture is appropriate based on Wagenvoord's pre-inspection good faith efforts to comply with the antenna structure fencing Rules.²²

¹⁶ See *Review of Technical and Operational Regulations of Part 73, Subpart A, AM Broadcast Stations*, Report and Order, 59 Rad. Reg. 2d (P&F) 927, para. 6, 928 (1986) (holding that towers must be enclosed by base fences unless surrounded by a protective perimeter property fence).

¹⁷ See *Forfeiture Order*, 28 FCC Rcd at 1947, para. 8 n. 21 (citing *Buchanan Broad., Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 4360 (Enf. Bur. 2000) (reducing forfeiture because "the muddy conditions around the base of the tower arguably impeded access, making the lack of effective fencing a less significant safety hazard") (*Buchanan Broadcasting*); *A Radio Company, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 2019 (Enf. Bur. 2007) (reducing forfeiture because base of tower surrounded by 12-inch deep swampy water filled with crocodiles, leeches, and local sewage overflow, thereby reducing safety hazard of lack of effective fencing)).

¹⁸ Letter from Dan J. Alpert, Counsel for Wagenvoord Advertising Group, Inc., to Walter Gernon, District Director, New Orleans Office, South Central Region, Enforcement Bureau, at 4 (Aug. 18, 2012) (on file in EB-FIELDSCR-12-00000481) (citing *Buchanan Broadcasting, Inc.*).

¹⁹ Cf. *Christopher H. Bennett Broad. of Wash., Inc.*, Forfeiture Order, 23 FCC Rcd 11285 (Enf. Bur. 2008) (cancelling AM tower fencing forfeiture because of totality of circumstances – antenna structure built on 12-foot pier base in flood plain, where construction of a fence was prohibited by local zoning rules) (*Bennett Broadcasting*).

²⁰ *Petition* at 4, 7.

²¹ See *Bennett Broadcasting*, 23 FCC Rcd at 11286–87, paras. 7, 12.

²² See 47 C.F.R. § 1.80(b)(8), note (listing "Good faith or voluntary disclosure" as a basis for adjusting forfeitures downward); see also *Sutro Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 15274, 15277, para. 10 (2004) (stating that the Commission will generally reduce a forfeiture "based on the good faith corrective efforts of a violator when those corrective efforts were taken prior to Commission notification of the violation"); *Radio One Licenses, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 20408 (Enf. Bur. 2002), *review granted in part and denied in part*, 18 FCC Rcd 15964 (2003) (reductions based on good faith efforts to comply generally involve situations where violators demonstrate that they initiated measures to correct or remedy violations prior to a Commission inspection or (continued . . .)

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended (Act), and Sections 0.111, 0.311, and 1.106 of the Rules, the Application for Review filed on April 1, 2013, by Wagenvoord Advertising Group, Inc., which has been appropriately treated by the Enforcement Bureau as a Petition for Reconsideration, is hereby **DENIED IN PART** and **GRANTED IN PART**.²³

10. **IT IS FURTHER ORDERED** that, pursuant to Section 503(b) of the Act and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules, Wagenvoord Advertising Group, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of five thousand six hundred dollars (\$5,600) for willful and repeated violation of Section 73.49 of the Rules.²⁴

11. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days after the release date of this Memorandum Opinion and Order.²⁵ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.²⁶ Wagenvoord Advertising Group, Inc. shall send electronic notification of payment to SCR-Response@fcc.gov on the date said payment is made. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁷ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters “FORF” in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank –

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investigation); *Catholic Radio Network of Loveland, Inc.*, Forfeiture Order, 29 FCC Rcd 121, 122–23, para. 5 (Enf. Bur. 2014) (“The Commission will generally reduce an assessed forfeiture based on the good faith corrective efforts of a violator when those corrective efforts were taken *prior* to Commission notification of the violation.”) (emphasis in original); *Bold Gold Media WBS, L.P.*, Forfeiture Order, 29 FCC Rcd 6016 (Enf. Bur. 2014) (granting a reduction based on good faith efforts to comply taken prior to inspection).

²³ 47 U.S.C. §§ 154(i), 405; 47 C.F.R. §§ 0.111, 0.311, 1.106.

²⁴ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 73.49.

²⁵ 47 C.F.R. § 1.80.

²⁶ 47 U.S.C. § 504(a).

²⁷ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

12. Any request for full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁸ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

13. **IT IS FURTHER ORDERED** that this Memorandum Opinion and Order shall be sent by both First Class Mail and Certified Mail, Return Receipt Requested, to Wagenvoord Advertising Group, Inc. at 2360 NE Coachman Rd., Clearwater, FL 33765, and to its counsel, Dan J. Alpert, at 2120 N 21st Rd., Arlington, VA 22201.

FEDERAL COMMUNICATIONS COMMISSION

Travis LeBlanc
Chief
Enforcement Bureau

²⁸ See 47 C.F.R. § 1.1914.